

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the matter of:	)	
	)	
Implementation of Section 103	)	
Of the STELA Reauthorization	)	MB Docket No. 15-216
Act of 2014	)	
	)	
Totality of the Circumstances Test	)	
	)	

**COMMENTS OF GRAY TELEVISION GROUP, INC.**

December 1, 2015

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## SUMMARY

This proceeding offers the Commission an opportunity to reconfirm the original, Congressionally-intended purpose of the Good Faith Negotiating Rule – ensuring that broadcasters and MVPDs actually are negotiating with the sincere intent to reach a deal. The Good Faith Negotiating Rule is not a backdoor through which MVPDs can challenge the substantive terms of retransmission consent agreements or a way to interject the Commission into economic disputes between what are often large sophisticated parties. Despite the clear Congressional directive to ensure that the parties are sincerely negotiating, MVPDs have been asking the Commission for more than fifteen years to use the Good Faith Negotiating Rule as a way to tilt the scales in private negotiations by proposing to label routine business disputes as bad faith. The MVPD-sponsored proposals in this proceeding are just the latest attempt by the cable and satellite lobby to entangle the Commission in the substantive terms of a retransmission consent negotiation.

Greater Commission involvement in retransmission negotiations will harm the public interest. First, rather than doing the hard work of negotiating a solution that is acceptable to both parties, each side will be tempted to use the government's processes to extract leverage in the course of its negotiation. The Commission's staff likely will become overwhelmed with trumped up good faith complaints that, at bottom, are a dispute about one issue: price. Second, only broadcasters – not their key competitors, the national cable networks – would be subject to enhanced Commission scrutiny of their MVPD distribution agreements. Shackled by greater government regulation, broadcasters would have less flexibility to negotiate for appropriate market value for their top-rated sports, news, and entertainment programming. Inevitably, this programming would migrate to the national cable networks because they would be in a better position to pay for it.

Keeping live sports and other big-budget programming on local broadcast stations serves the public interest. First, it is available to anyone with an antenna for free. Second, the retransmission fees that broadcasters charge for this premier programming are lower than the fees national cable networks charge for comparable (but lower rated) programming.

Broadcasters charge lower licensing fees than cable networks because broadcasters earn more advertising revenue than cable networks. The higher advertising revenue subsidizes the cost of programming and allows local broadcast stations to charge lower retransmission fees than a cable network otherwise would charge for the same programming.

As proof, the Commission only needs to review the per-subscriber fees charged by cable networks like ESPN, TNT, or the NFL Network and compare those fees to the retransmission fees charged by local broadcast stations. Those cable networks offer a handful of premier sporting events surrounded by schedule chocked full of low-rated programming. Meanwhile, each week broadcast stations deliver top sporting events; the most watched primetime and daytime programming; local news programming that has more viewers than FOX News, CNN, and MSNBC combined; and popular syndicated fare. The value gap is undeniable.

Cable networks must charge higher licensing fees for their lower-rated programming because they cannot make up the difference with advertising. Most cable networks are available in 20 million fewer homes than broadcast stations, and even the highest rated programs on cable garner fewer viewers than if the same program were available on broadcast. As a result, advertising revenue for cable networks is lower, which puts broadcasters in the best position to deliver high-cost programming at the lowest price to the most viewers.

Instead of adopting proposals that would handicap broadcasters as they negotiate for retransmission consent, the Commission should be encouraging more live sports and other top

programming to remain on broadcast television. If live sports like the NFL moved away from the broadcast networks to cable, the licensing fees that networks like ESPN, Fox Sports 1, and TNT would charge would be astronomical. Those higher fees naturally would be passed on to consumers. The best way to ensure that expensive programming remains on broadcast – where it will be sold to MVPDs at a lower price – is to ensure that the Commission’s rules are not biased against broadcasters as compared to their national cable network competitors.

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**COMMENTS OF GRAY TELEVISION GROUP, INC.**

Gray Television Group, Inc. (“Gray”) hereby submits these comments in response to the Notice of Proposed Rulemaking (the “NPRM”) seeking comment on various proposals to modify the Commission’s Good Faith Negotiating Rule.<sup>1</sup> The NPRM presents the Commission with an important opportunity to reorient the Good Faith Negotiating Rule toward its original purpose – to ensure that the broadcasters and MVPDs have “a sincere desire to reach an agreement that is acceptable to both parties.”<sup>2</sup> The Good Faith Negotiating Rule is not a backdoor opportunity to litigate before the Commission “commonplace disagreements encountered by negotiating parties in the everyday business world.”<sup>3</sup> Yet that is precisely what many MVPDs and their lobbying organizations seek. The changes the MVPDs have proposed over the years would embroil the Commission in run-of-the-mill business disputes that often boil down to one simple issue: how much money should an MVPD pay for the most watched and most valuable programming on its

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<sup>1</sup> *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd 10327 (2015). *See also* 47 U.S.C. § 325(b)(3)(C)(ii)-(iii); 47 C.F.R. § 76.65 (the “Good Faith Negotiating Rule”).

<sup>2</sup> *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 32 (2000) (“*Good Faith Order*”).

<sup>3</sup> *Id.*

system. Congress never intended for the Commission to be the arbiter of a private business dispute, and the Commission should not accept the MVPDs invitation to do so.

**I. GRAY’S HISTORY SUCCESSFULLY NEGOTIATING THOUSANDS OF RETRANSMISSION CONSENT AGREEMENTS DEMONSTRATES THAT EXPANDING THE GOOD FAITH NEGOTIATING RULE IS UNNECESSARY AND WOULD BE UNWISE.**

Based on Gray’s experience negotiating thousands of retransmission consent agreements over more than twenty years, any expansion of the Good Faith Negotiating Rule from its original purpose is unnecessary. A viewer of one of Gray’s stations is far more likely to lose service as a result of a lightning strike or other technical difficulties within an MVPD’s plant than a retransmission consent dispute. Over twenty plus years and negotiating several thousand retransmission agreements, Gray was unable to reach an agreement with an MVPD precisely two times. Yet, in both instances, after a brief dispute, the parties quickly came to terms, and service was restored for the MVPD’s customers. Once the Commission moves past the hyperbolic rhetoric by the cable and satellite lobby, the pattern is clear: retransmission consent disputes are rare and, when they do occur, short lived.

Importantly, Gray’s two retransmission consent disputes were not the product of bad faith by either side. Rather, in both instances, the parties were at a bona fide impasse over one issue: price. Gray offered both MVPDs a brief extension to continue negotiating or for a temporary “cooling off” period, but in both instances the MVPD rejected the extension (suggesting that the cable and satellite industry’s common refrain begging for an extension to continue negotiating is nothing more than empty rhetoric). In any event, the MVPDs rejected Gray’s extension because a further extension was unlikely to help the parties bridge the gap. Both sides were unwilling to budge from their last, best, and final offers. Notably, neither Gray nor the MVPD ever suggested that the other side lacked a sincere desire to reach an agreement. Indeed, quite the contrary, both

sides desperately wanted to reach an agreement to avoid the public relations black eye from a dispute. Both sides spent hours making phone calls, sending emails, and trading draft agreements, and, for one of the MVPDs, two of Gray's executives even made an in-person visit in an attempt to hash out an agreement. But, all of this effort was to no avail. Despite not reaching an agreement, Gray believes both negotiations represented the very epitome of a good faith effort on both sides to reach a deal. Moreover, even after the respective deadlines had passed and the MVPDs had pulled Gray's stations, the parties remained in constant contact and continued to negotiate until a deal was struck.

The Commission should not expand the reach of its Good Faith Negotiating Rule merely because, on rare occasions, parties have a fundamental disagreement on price or some other key issue. The proper venue to resolve those disputes is through private negotiations as Gray has done thousands of times – not through encouraging more litigation in front of the Commission.

## **II. THE GOOD FAITH NEGOTIATING RULE IS ONLY INTENDED TO ENSURE THAT THE PARTIES ARE ACTUALLY NEGOTIATING – NOTHING MORE.**

Congress never intended for the Good Faith Negotiating Rule to become a means for the Commission to regulate economic issues or the substantive terms of retransmission consent negotiations. Congress created the retransmission consent rules in 1992 “to establish a marketplace for the disposition of the rights to retransmit broadcast signals; [not] to dictate the outcome of the ensuing marketplace negotiations.”<sup>4</sup> When Congress enacted the Good Faith Negotiating Rule as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), it did not change this fundamental truth. SHVIA did not grant the Commission authority to “assume a substantive role in the negotiation of the terms and conditions of retransmission

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<sup>4</sup> S. Rep. No. 92, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.

consent.”<sup>5</sup> Instead, in its *Good Faith* Order, the Commission properly concluded that, because the Good Faith Negotiating Rule departs from the long-standing common law principle protecting the freedom of contract, it must be narrowly construed.<sup>6</sup> Thus, the Commission wisely limited its Good Faith Negotiating Rule to prohibiting those negotiating practices that “reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties.”<sup>7</sup>

Nothing in Section 103(c) of the STELA Reauthorization Act of 2014 gives the Commission new power to inject itself into private negotiations between broadcasters and MVPDs. Section 103(c) merely asks the Commission “to review its totality of the circumstances test for good faith negotiations.”<sup>8</sup> It does not command any particular result or grant the Commission any new substantive authority over the retransmission consent marketplace. “[W]hen Congress intends for the Commission to directly insert itself in the marketplace for video programming, it does so with specificity.”<sup>9</sup> This is especially true here where Congress on several occasions has rejected approaches that would have given the Commission a greater role overseeing retransmission consent negotiations.<sup>10</sup>

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<sup>5</sup> See *Good Faith Order*, ¶ 14 (“We do not interpret the good faith requirement of SHVIA to alter this settled course and require that the Commission assume a substantive role in the negotiation of the terms and conditions of retransmission consent.”). See also *id.* at ¶ 23 (“Congress clearly did not intend the Commission to sit in judgement of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD”).

<sup>6</sup> *Good Faith Order*, ¶ 20. See also *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 304 (1959) (holding that any statutory provision that deviates from the common law “must be strictly construed for no statute is to be construed as altering the common law, farther [sic] than its words import”).

<sup>7</sup> *Good Faith Order* at ¶32.

<sup>8</sup> Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

<sup>9</sup> *Good Faith Order*, at 23 (citing 47 U.S.C. § 548 prohibiting discriminatory prices, terms, and conditions in the market for vertically integrated, satellite delivered cable programming).

<sup>10</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”).

Despite the clear limitations on the Commission’s authority, MVPDs continue to lobby the Commission to use the Good Faith Negotiating Rule as a way to constrain broadcasters by imposing a complex and intrusive regulatory regime governing retransmission consent negotiations.<sup>11</sup> Time and again, however, the Commission has wisely rejected these attempts. Indeed, many of the proposals that the MVPDs raise in this proceeding are the same proposals that the Commission considered and rejected in the *Good Faith Order*. Predictably, however, MVPDs have attempted to re-litigate their past policy failures in form of trumped up good faith complaints and various other petitions to amend the Commission’s rules regarding retransmission consent. The Commission should once again reject these same, well-worn proposals, and reaffirm that the Good Faith Negotiating Rule is designed to “ensure[] that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.”<sup>12</sup>

**A. The MVPD-Sponsored Proposals to Change the Good Faith Negotiating Rule Necessarily Would Entangle the Commission in Economic Disputes Over Substantive Terms.**

Despite the lack of any statutory authority for embroiling the Commission in disputes over substantive terms in retransmission consent negotiations, that is exactly what the various MVPD-sponsored proposed changes would do. For example, for decades MVPDs have complained about broadcasters and cable network owners bundling programming as part of a single negotiation, and the MVPDs once again call for this practice to be deemed bad faith. Any such rule, however, necessarily would mire the Commission in the weeds of dozens of

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<sup>11</sup> *Good Faith Order*, ¶23 (“Despite the arguments of the satellite industry and other MVPDs, we find nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions or the interconnection requirements of Section 251 of the Communications Act.”).

<sup>12</sup> *Good Faith Order*, ¶24.

substantive terms that are commonly found in retransmission consent agreements with little controversy. Retransmission consent agreements routinely require MVPDs to retransmit multicast channels or other commonly owned programming as part of the consideration that the MVPDs provide to broadcasters in exchange for the grant of retransmission consent. Similarly, in some instances a retransmission consent agreement will require an MVPD to retransmit a station on certain out-of-market systems where it has historically been carried and enjoys strong viewership. These substantive terms are part of the overall value equation between a broadcaster and the MVPD. Bundling brings value to broadcasters because it can bring more eyeballs (and advertising revenue) to a broadcaster's channels. Naturally, when an MVPD is unable or unwilling to carry certain additional program streams or retransmit a station on certain systems that are in the heart of its local service area, the value equation changes and other terms including price are adjusted accordingly. Any rule that touches on this routine give-and-take of a negotiation would bring the Commission into disputes about retransmission pricing and whether a bundled discount is appropriate under the particular circumstances. Nothing in the Communications Act gives the Commission authority – let alone the expertise – to determine whether an unbundled offer is “a real economic alternative to a bundle of broadcast and non-broadcast programming” as the cable lobby asks.<sup>13</sup>

Rather, the Commission's authority is limited to sanctioning a party for “failing to negotiate in good faith.”<sup>14</sup> In other words, does the MVPD or broadcaster sincerely desire to reach an agreement with the other party? Preferring that an MVPD retransmit all of a station's multicast channels or also retransmit the station's primary program stream on certain out-of-market systems says nothing about whether the parties actually want to get a deal done.

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<sup>13</sup> American Television Alliance *Ex Parte* Letter in MB Docket No. 10-71 at 3 (filed July 17, 2015)

<sup>14</sup> Section 325(b)(3)(C)(ii), (iii) (emphasis added).

Naturally, any MVPD will want as much flexibility as possible to decide what it carries and where, and the MVPD will want to pay the lowest price possible. Similarly, a broadcaster will want as much guaranteed carriage in its service area and as high a price as it can receive. Disagreements on these substantive terms are not bad faith; they are a byproduct of the ordinary ebb-and-flow of any negotiation between two sophisticated parties.

The other proposals by the cable and satellite lobby fare no better. Proposals regarding agreement expiration dates, tier placement, channel positions, penetration requirements, and which subscribers should be considered “subscribers” for purposes of calculating retransmission fees are all substantive terms that are regularly hashed out in any negotiation. Preferring one tier over another or a particular channel position has no bearing on whether a party truly desires to reach an agreement. Moreover, substantively, Gray questions how the Commission could craft a regulation that addresses these routine business questions that crop up in every negotiation without encouraging a race to the FCC every time a broadcaster suggests that its programming should remain on the basic tier or on its historic channel position as it has for decades. The other proposals are equally flawed. For example, how would the Commission ensure that a retransmission agreement does not expire before a “marque” event as some MVPDs have proposed? The NFL and college football season lasts from September to February. Would having a retransmission consent agreement expire in those seven months be bad faith? Moreover, March and April feature, the NCAA Tournament and the Masters, and May includes a number of high profile season finales for prime time programs. That would leave the three summer months (during non-summer Olympic years) as the only acceptable months during which a retransmission consent agreement could expire; unless, of course, the Commission considers the MLB All Star Game, U.S. Open, British Open, and PGA Championship marque

events. Embroiling the Commission staff in determining what is an acceptable expiration date and what is not raises other questions too: if it is bad faith for a broadcaster to “insist” that a retransmission agreement expires before a marquee event, is bad faith for an MVPD to “insist” that an agreement expire during the summer when the parties may have less urgency to reach a deal? Ultimately, all of these issues are better left to the marketplace to determine an appropriate outcome, as has been done for more than twenty years.

Other proposals by the cable and satellite lobby would actually cut off and discourage negotiation. For example, the proposal to prohibit restrictions on the use of certain devices or functionalities would have prevented the landmark retransmission consent agreements and settlements between CBS and Dish Network and between ABC and Dish Network. As was well reported at the time, both broadcasters reached an agreement with Dish that disables Dish’s “autohop” commercial-skipping functionality in network programming during Nielsen’s C7 window.<sup>15</sup> Any good faith rule touching upon consumer equipment or functionalities, however, would have prevented those negotiations from occurring at all or would have placed the Commission’s staff in the middle of a complex settlement between two large, sophisticated companies. Neither result would have served the public interest nearly as well as the private resolution the parties reached themselves without the aid or interference from the government.

Finally, some proposals by the cable and satellite lobby would bring into question routine provisions that (until now) were not particularly controversial. For example, the proposal to prohibit negotiation for “prospective” channels or systems would call into question run-of-the-mill “after-acquired station” and “after-acquired system” clauses that are a part of nearly every retransmission consent agreement. For efficiency, both broadcasters and MVPDs often prefer

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<sup>15</sup> Todd Spangler, *CBS, Dish Reach carriage Deal After Brief Blackout*, VARIETY (Dec. 6, 2014) at <http://variety.com/2014/tv/news/cbs-dish-reach-carriage-deal-1201372651/>

that only one agreement govern the relationship between the two parties rather than looking to dozens of different agreements each covering a different system or station. Thus, when an MVPD acquires a new cable system or when a broadcaster acquires a new television station that facility often is added to the parties' existing agreement. Including after-acquired station clauses or after-acquired system clauses in an agreement does not suggest that one party or the other has no desire to reach an agreement and, therefore, should not be deemed bad faith.

**B. Only Tactics Demonstrating That a Party Has No Desire to Reach an Agreement Should Be Considered Bad Faith.**

If the Commission makes any changes at all to its Good Faith Negotiating Rule, it should be to clarify that the Commission only prohibits negotiating tactics that show that a party has no sincere desire to reach an agreement. For example, an MVPD cannot insist on language that the MVPD knows that a broadcaster cannot accept because it would violate the broadcaster's network affiliation agreement or other key programming agreements. Thus, insisting on language requiring a broadcaster to grant retransmission consent for a station's signal on every cable system owned by the MVPD across the country would violate the Good Faith Negotiating Rule if the MVPD were aware that such language violates the broadcaster's network affiliation agreement.<sup>16</sup> Similarly, insisting on certain rights to distribute a station's signal over the Internet even after the MVPD is aware that a broadcaster's programming agreements do not permit such distribution would also violate the Good Faith Negotiating Rule. To be clear, including such broad language in an initial offer or probing a broadcaster on the extent of its rights ordinarily would not constitute bad faith. But, repeatedly insisting on terms that an MVPD knows would place a broadcaster in breach of its programming agreements or other important relationships

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<sup>16</sup> Gray recognizes that the Good Faith Negotiating Rule requires broadcasters to ask their networks for a waiver of a language in an affiliation prohibiting carriage on distant, out-of-market systems if an MVPD asks. The MVPD would only violate the Good Faith Negotiating Rule if it continued to insist on such language after the network refused the waiver.

suggests that the MVPD does not have “a sincere desire to reach an agreement that is acceptable to both sides.” Put simply, it is bad faith and should be labeled as such.

**III. ANY CHANGE TO THE GOOD FAITH NEGOTIATING RULE THAT SHACKLES LOCAL BROADCASTERS WOULD CAUSE MORE PROGRAMMING TO MIGRATE TO CABLE NETWORKS AND WOULD LEAD TO HIGHER TOTAL PROGRAMMING FEES PAID BY MVPDS.**

Ultimately, the crusade by the cable and satellite lobby against retransmission consent and the MVPD industry’s attempt to label ordinary, run-of-the-mill business disputes as bad faith boils down to one key issue: the price broadcasters charge for retransmission consent. If (contrary to its statutory mandate) the Commission turns this proceeding into a referendum on retransmission consent fees or other substantive business points, the Commission must recognize that any change to the Good Faith Negotiating Rule that handcuffs local broadcasters would cause top quality programming to migrate from free, over-the-air broadcast television to unregulated, expensive pay cable networks. This migration would result in higher programming fees from those cable networks, which would mean more misleading surcharges by MVPDs and higher bills to consumers. The fact is high-quality sports, entertainment, and news programming is expensive to produce, and programming costs – especially for live sports – are increasing.<sup>17</sup> Over the coming decades, premier programming will migrate to whatever platform is able to pay for it (local broadcast, cable network, over-the-top, or elsewhere). Without retransmission consent revenue, broadcasters would be at a distinct disadvantage when bidding for programming against national cable networks funded by hefty affiliate licensing fees.

From a pure public interest standpoint, the question should be which platform can deliver this programming to the most viewers at the lowest cost, and then the Commission should insure

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<sup>17</sup> Cecilia Kang, *Bidding War Between Networks, Sports Leagues Will Increase Price of Cable TV*, WASH. POST (Jan. 23, 2015) at [http://www.washingtonpost.com/business/economy/bidding-war-between-networks-sports-leagues-will-increase-price-of-cable-tv/2015/01/23/d0cb19f4-9db8-11e4-a7ee-526210d665b4\\_story.html](http://www.washingtonpost.com/business/economy/bidding-war-between-networks-sports-leagues-will-increase-price-of-cable-tv/2015/01/23/d0cb19f4-9db8-11e4-a7ee-526210d665b4_story.html)

that its rules do not unintentionally handicap that more efficient platform. Both broadcasters and cable networks earn revenue from a mix of advertising and retransmission consent/affiliate licensing fees. Naturally, high advertising revenue makes a distributor less reliant on charging licensing fees to MVPDs. Conversely, if a distributor earns less advertising revenue, it will need to increase its licensing fees to make up the difference. In other words, advertising revenue can subsidize the high cost of programming. Although most can agree that the Commission should not be picking winners and losers in the video industry, the Commission also should ensure that its rules are not biased against the platform that earns the most advertising revenue.

**A. Local Broadcasters Have Substantially Higher Ratings than Cable Networks and, Thus, Earn More Advertising Revenue.**

When it comes to amassing large audiences and earning advertising revenue, the power of local broadcast stations is unmatched. Ratings for broadcast stations dominate their cable network competitors. The average ratings for each of the top four broadcast networks (ABC, NBC, CBS, and FOX) are at least three times the ratings for the top rated cable networks.<sup>18</sup> In the 2014-2015 television season, 47 of the 50 highest rated television series were on local broadcast television stations.<sup>19</sup> Only AMC's *The Walking Dead* (ranked #4), ESPN's *Monday Night Football* (ranked #18) and HBO's *Game of Thrones* (ranked #48) cracked the top 50.

The disparity in ratings between local broadcast stations and cable networks even holds true when a substantially identical program appears on a broadcast station and a cable network. For example, ESPN's ESPY awards show traditionally has aired on cable, but in 2015 ESPN moved the ESPYs to ABC Network. It was a smashing success. Ratings for the 2015 ESPYs

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<sup>18</sup> Robin Flynn, SNL Kagan, *Putting Retrans Fees in Perspective Following FCC's Recent Retrans Ruling* (Apr. 14, 2014).

<sup>19</sup> TV Insider, *These are the 50 Most-Watched TV Shows of the 2014-15 Season*, at <http://www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers/>

skyrocketed 253% above the 2014 broadcast, which aired on ESPN and ESPN2.<sup>20</sup> In 2014, the NFL Network and CBS split the Thursday Night Football Package. The ratings for weeks two through eight when the games appeared on CBS were more than double the ratings for weeks nine through seventeen when the games were available exclusively on the NFL Network.<sup>21</sup> This disparity held true even in the local market of the NFL teams playing on Thursday night where ratings were 30% higher when the game aired on CBS compared to a game on the NFL Network.<sup>22</sup> A few more examples are below:

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<sup>20</sup> Medialife Magazine, *Move to Broadcast Lifts ESPYs to Record*, at <http://www.medialifemagazine.com/move-to-broadcast-lifts-espys-to-record/>

<sup>21</sup> TVB, *2014 Thursday Night Football on CBS*, at <http://www.tvb.org/research/2053636/NFL2014>

<sup>22</sup> TVB, *NFL 2014 A Local Success*, at [http://www.tvb.org/media/file/TVB\\_Analysis\\_NFL\\_2014\\_A\\_Local\\_Success.pptx](http://www.tvb.org/media/file/TVB_Analysis_NFL_2014_A_Local_Success.pptx)

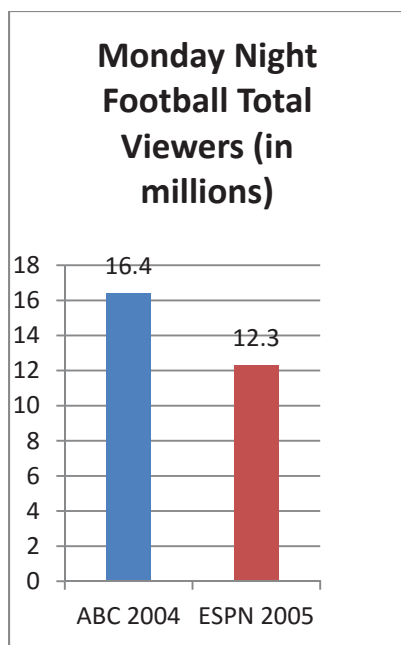


Figure 1: See Leonard Shapiro and Mark Maske, *Monday Night Football Changes the Channel*, WASH. POST (Apr. 19, 2005), available at <http://www.washingtonpost.com/wp-dyn/articles/A63538-2005Apr18.html>; Sara Bibel, *ESPN's Monday Night Football: Cable's Most-Watched Series for Eighth Straight Year*, TV by the Numbers (Dec. 26, 2013) available at <http://tvbythenumbers.zap2it.com/2013/12/26/espns-monday-night-football-cables-most-watched-series-for-eighth-straight-year/224949/>.

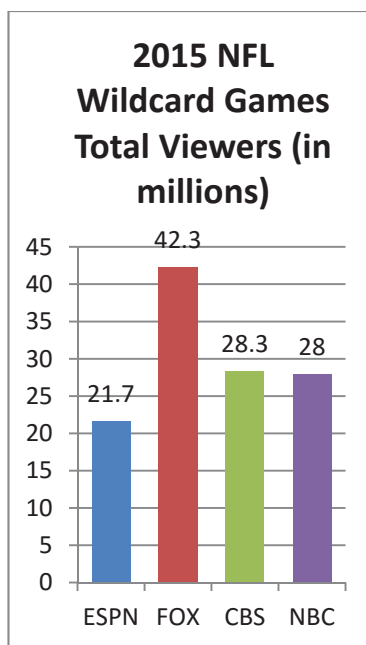


Figure 2: See Sara Bibel, *NFL Wild Card Weekend Averages Nearly 30 Million Viewers*, TV by the Numbers (Jan. 5, 2015) available at <http://tvbythenumbers.zap2it.com/2015/01/05/nfl-wild-card-weekend-averages-nearly-30-million-viewers/346358/>.

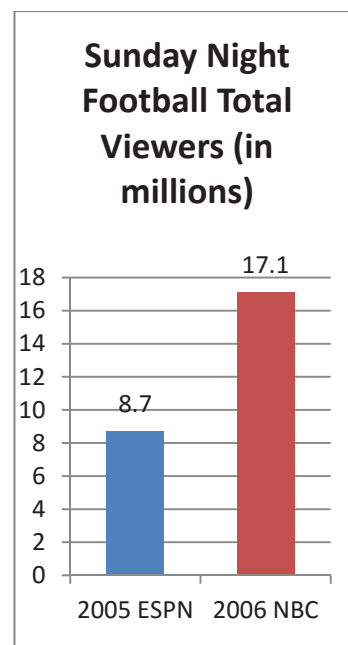


Figure 3: See Robert Seidman, *Sunday Night Football: Best Average Viewership in 14 Years*, TV by the Numbers (Oct. 5, 2010) available at <http://tvbythenumbers.zap2it.com/2010/10/05/sunday-night-football-best-average-viewership-in-14-years/66688/>; Business of Sports, Scott R. Rosner & Kenneth L. Shropshire 2d ed., p 278.

With cable networks like ESPN having lost more than seven million homes in just four years, the disparity between broadcast audiences and cable network audiences will only continue to grow.<sup>23</sup> Indeed, ABC is now available in nearly 24 million more homes than ESPN making it highly unlikely that ratings for an event on ESPN could match the ratings (and accompanying advertising revenue) for the same event airing on ABC or any other broadcast network.<sup>24</sup>

<sup>23</sup> *ESPN Losing Pace with Broadcast Rivals*, Sports Media Watch (July 26, 2015), at <http://www.sportsmediawatch.com/2015/07/espns-fewer-cable-subscribers-losing-pace-with-broadcast-rivals/>

<sup>24</sup> Id.

Because ratings for cable networks are substantially lower than ratings for broadcast stations, cable networks earn less advertising revenue, and they are more dependent on affiliate fees charged to MVPDs. In fact, affiliate fees represent more than 40% of the revenue for most major cable operators, and, for the sports-focused networks, the percentage is even higher.<sup>25</sup> By contrast, less than 20% of broadcast revenue comes from retransmission consent fees.<sup>26</sup> In 2014, advertising accounted for approximately 80% of all broadcast revenue.

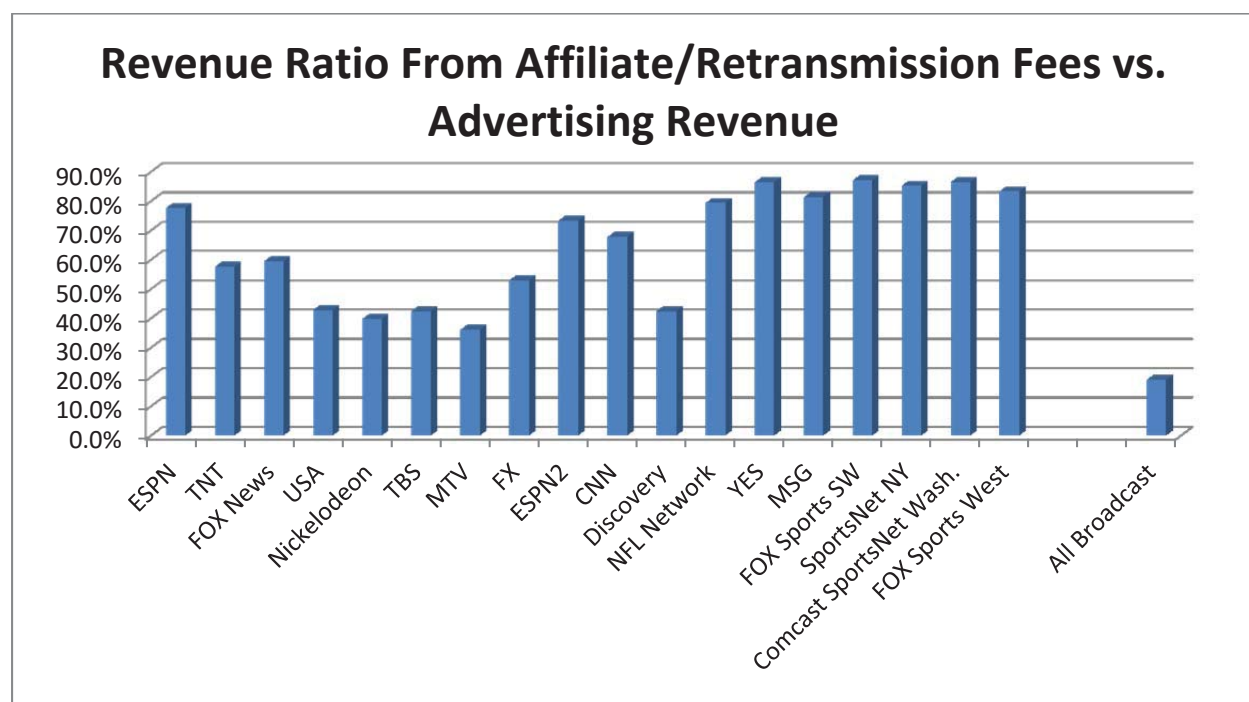


Figure 4: Source: Barclay's Capital, Inc. estimates for 2012 revenue from advertising and affiliate fees from top cable networks. See Note 25.

Because affiliate fees represent a much higher percentage of the revenue mix for cable networks than for broadcast stations, it necessarily means that when cable networks and

<sup>25</sup> See Barclays Capital, Inc., Internet and Media 101 (May 2013) at 40, 50. All revenue estimates from Barclays and SNL Kagan include only advertising revenue and affiliate fee or retransmission consent fee revenue and do not include revenue from other ancillary sources.

<sup>26</sup> In 2014, SNL Kagan estimates broadcasters earned \$4,858,000 in retransmission revenue compared to \$20,656,000 in advertising revenue. In 2015 and 2016, SNL Kagan predicts that the ratio between retransmission revenue and ad revenue will increase to 25%/75%, but even at that level the ratio remains well below ratio for cable networks. See Economics of Broadcast TV Retransmission Revenue, SNL Kagan (2015).

broadcasters bid for new programming, cable networks will rely on affiliate fees to pay their programming expenses to a much greater extent than broadcasters. Meanwhile, broadcasters will use advertising revenue to subsidize more of their programming costs leading to lower fees to MVPDs.

**B. Higher Advertising Revenue Allows Broadcasters to Charge Lower Fees than Cable Networks Do for the Same Programming.**

To be sure, retransmission consent fees have increased over the last several years and are becoming a more important piece of the revenue mix for local broadcast stations. Indeed, the American Cable Association, the American Television Alliance, and various MVPDs have loudly complained that local broadcast stations will earn approximately \$6.3 billion in retransmission consent revenue in 2015.<sup>27</sup> Neither the MVPDs nor their lobbying organizations, however, put this number into proper context. Breaking down the ACA's and ATVA's \$6.3 billion figure yields an average "Big Four" retransmission consent fee of \$1.11 per subscriber per month.<sup>28</sup> When this figure is compared to the monthly, per-subscriber fee charged by much lower rated cable networks, it proves Gray's point: local broadcast stations charge lower fees for top-quality, must-have programming than cable networks. These lower fees are possible because of the larger audiences and outsized advertising revenue that local broadcasters deliver.

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<sup>27</sup> American Cable Association, *Ex Parte Communication* in MB Docket 10-71 (July 31, 2015) at 1 n.2; American Television Alliance, *Ex Parte Presentation* in MB Docket No. 10-71 (July 22, 2015) at 1-2.

<sup>28</sup> SNL Kagan divided \$6.3 billion by 101 million MVPD subscribers and then by 4.7 to determine the approximate fee earned by each "Big Four" affiliate. The extra 0.7 accounts for non-Big Four stations that also earn retransmission fees in many markets. The resulting figure is divided by 12 to calculate the monthly per-subscriber fee. *See* Economics of Broadcast TV Retransmission Revenue, SNL Kagan (2015).

Network	Monthly Per-Subscriber Licensing/Retransmission Fees in 2015 <sup>29</sup>	Average Prime Time Total Viewers (Live + SD) July 6-August 2, 2015 (000's) <sup>30</sup>
ESPN	\$6.61	903
TNT	\$1.65	1,592
Disney Channel	\$1.34	1,785
NFL Network	\$1.31	** <sup>31</sup>
FOX News Channel	\$1.25	1,668
<b>Average "Big Four" Affiliate</b>	<b>\$1.11</b>	<b>4,131</b>
USA Network	\$1.00	1,572
FOX Sports 1	\$0.99	**
TBS	\$0.85	1,356
ESPN2	\$0.83	**
Nickelodeon/Nick at Nite	\$0.73	723
SEC Network	\$0.66	**
CNN	\$0.64	**
FX Network	\$0.62	1,074
MTV	\$0.50	**
AMC	\$0.42	859
Discovery Channel	\$0.42	1,658
Big Ten Network	\$0.40	**
Golf Channel	\$0.35	**
A&E	\$0.31	862
The Weather Channel	\$0.14	**

The fees charged by these low rated cable networks put the retransmission fees charged by broadcasters into proper perspective. If eight exclusive regular season NFL games on the NFL Network are worth \$1.31 per subscriber, MVPDs should have no complaints about the fees charged by CBS, FOX, and NBC affiliates, which offer more than double the number of regular season games, plus NFL Playoff games, plus the Super Bowl in rotating years. Similarly, if the

<sup>29</sup> SNL Kagan, *Basic Cable – Affiliate Revenue Per Avg Sub/Month* (2015); see also Clay Travis, ESPN Sues Verizon over Cable Offerings at <http://www.foxsports.com/college-football/outkick-the-coverage/espn-sues-verizon-over-cable-offerings-042715>.

<sup>30</sup> TV by the Numbers, Network vs. Network, at <http://tvbythenumbers.zap2it.com/category/network-vs-network/>.

<sup>31</sup> Networks denoted with \*\* did not finish among the top-25 rated cable networks during any of the four weeks between July 6, 2015 and August 2, 2015.

SEC Network can charge \$0.66 and the Big Ten Network can charge \$0.40 for a mix of second- and third-tier college football and basketball games, the premier college football games on CBS, ABC, FOX, and NBC should be worth at least that same amount (if not more) – on top of the value for the NFL programming. Of course, local broadcast stations offer more than just the most high-profile sporting events. Local broadcast stations also offer top-rated and critically acclaimed prime-time dramas. FX charges \$0.62 per subscriber for its much lower-rated dramas. News and weather also is a key component of broadcast programming, and more viewers tune to broadcast stations for news than all of the national cable networks combined, including FOX News (\$1.25), CNN (\$0.64), and the Weather Channel (\$0.14).<sup>32</sup> Adding it all up – and even accounting for the commercial avails that some cable networks offer to MVPDs – the total package of sports, news, drama, general entertainment, and weather programming provided by local broadcast stations is worth far more than what broadcasters charge in retransmission fees.<sup>33</sup>

**C. Any Change to the Retransmission Consent Rules that Handicaps Local Broadcasters Will Cause High-Priced Sports Programming to Migrate to Cable Networks, Which Will Charge Even Higher Affiliation Fees Than Broadcasters Would.**

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If enacted, the proposals pushed by the cable and satellite lobby would hamstring broadcasters as they negotiate retransmission consent agreements with MVPDs. Broadcasters would have less freedom to negotiate for the appropriate market-based value for their

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<sup>32</sup> In 2014, the median total-day viewership for FOX News, CNN, and MSNBC combined was a paltry 1.798 million people. By comparison, the late news and early evening newscasts on local broadcast stations averaged almost 25 million viewers each and the local morning news averaged almost 12 million viewers. Similarly, the total combined average viewership for the network evening newscasts on NBC, ABC, and CBS was 23.7 million and the combined average viewership for the Sunday morning talk shows on NBC, ABC, CBS and Fox was 9.8 million. See Pew Research Center, State of the News Media 2015, available at <http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf>.

<sup>33</sup> Gray recognizes that many cable networks offer local advertising avails to help offset their high licensing fees. But, advertising avails in low-rated programming does not eliminate the enormous value gap between broadcast programming and cable networks.

programming, and the Commission would become embroiled in ordinary business negotiations. Notably, none of their proposals would touch the expensive, national cable networks. Cable networks would remain unburdened by any restrictions when negotiating their affiliate fees. This regulatory imbalance would place broadcasters at a significant disadvantage to their cable network competitors when negotiating for their fair share of programming fees. Over time, this regulatory imbalance would limit the ability of broadcasters to pay for premier programming and cause high-profile programming to migrate from broadcasters to the unregulated cable networks. Affiliate fees would rise as cable networks seek to pay for their new programming, and because cable networks (1) are available in 20 million fewer homes, (2) have smaller average audiences, and (3) earn less advertising revenue than broadcasters, affiliate fees would need to rise higher than the retransmission fees that broadcasters would have charged for the same exact programming.

Before the MVPD lobby calls for a fundamental re-shaping of the retransmission consent system, it should ask itself what networks like FOX Sports 1 would charge if they suddenly had the Sunday afternoon package of NFL games; what TBS and TNT would charge if they had the entire NCAA Tournament and World Series; or what the SEC Network would charge if it offered the SEC football game of the week currently on CBS. If live sports were to migrate from broadcast to cable networks, the licensing fees from those cable networks would skyrocket, and those increases would be passed on to consumers. On the other hand, keeping popular programming on broadcast stations will minimize the total fees charged to MVPDs and will ensure that popular programming remains available for free with an over-the-air antenna.

## **CONCLUSION**

The Commission should reject the MVPD industry's attempt to use the Good Faith Negotiating Rule as a backdoor to regulating substantive terms of retransmission consent agreements. The MVPD's proposals violate the Communications Act and would unduly shackle broadcasters as they negotiate fair compensation for their programming. As a natural consequence, broadcasters would be disadvantaged when bidding for new programming, and top programming would migrate away from free, over-the-air broadcast stations to expensive, unregulated cable networks that would charge far more in affiliate fees than broadcasters would seek. This does not serve the public interest, and it is contrary to the will of Congress.

Respectfully submitted,

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